

**Entered on Docket
February 18, 2015**
**EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA**



**The following constitutes
the order of the court. Signed February 17, 2015**

**M. Elaine Hammond
U.S. Bankruptcy Judge**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 14-54232 MEH
Chapter 11

Pacific Thomas Corporation,

Case No. 14-54232 MEH
Chapter 11

Kyle Everett,

Adv. No. 14-5115

Plaintiff,

16 || vs.

Date: January 15, 2015
Time: 1:00 p.m.
Ctrm: 3070

MEMORANDUM DECISION ON DEFENDANT'S
MOTION FOR JUDGMENT ON THE PLEADINGS

21 Defendant Randall Whitney seeks judgment on the pleadings on the
22 basis that Plaintiff, Kyle Everett, Chapter 11 Trustee for Pacific
23 Thomas Corporation ("Debtor"), is prohibited from asserting a claim for
24 recovery of post-petition transfers under the doctrine of *res judicata*.
25 Whitney argues that the claim asserted in this adversary proceeding
26 arises out of the same transactional nucleus of facts as the claims

1 brought against him in a prior adversary proceeding, No. 14-5114
2 (formerly 13-4079) (the "First Adversary"), which resulted in an
3 injunction against him. The court agrees and grants Whitney's motion.

4 This court has jurisdiction over this matter pursuant to 28 U.S.C.
5 § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E)
6 and (F).

7

8 Background:

9 On April 11, 2013, the Trustee filed the First Adversary against
10 Pacific Trading Ventures ("PTV"), Jill Worsley, and Whitney. The
11 Trustee sought declaratory relief, accounting, turnover and injunctive
12 relief. Through it, the Trustee obtained a Preliminary Injunction on
13 November 18, 2013 requiring PTV to cease operating as the manager for
14 Debtor's self-storage and other facilities and requiring turnover of
15 Debtor's books and records. A trial in the First Adversary was held
16 on April 29, 2014 and the court issued its Decision After Trial on July
17 8, 2014.¹ A judgment was entered on November 6, 2014 (the "Judgment")
18 granting a final injunction consistent with the Preliminary Injunction
19 and granting the Trustee a judgment of \$566,685 against PTV for
20 postpetition rents received and not turned over to the Trustee. The
21 defendants to the First Adversary timely appealed. That appeal is
22 proceeding before the District Court.

23

24

25

¹ An Amended Decision After Trial was entered on November 4, 2014 to clarify one point not relevant to this matter.

1 Subsequently, the Trustee filed this adversary proceeding (the
2 "Second Adversary") asserting a claim for recovery of postpetition
3 transfers against Whitney. Whitney answered the complaint and now
4 brings this motion for judgment on the pleadings.

5

6 Legal Analysis:

7 *Res Judicata* applies "whenever there is (1) an identity of claims,
8 (2) a final judgment on the merits, and (3) privity between the
9 parties." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional
Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003); *Stewart v. U.S.
Bancorp*, 297 F.3d 953, 956-57 (9th Cir. 2002). The third factor is not
12 in dispute. Whitney was an individual defendant in the First Adversary
13 and is the sole defendant in this proceeding. The First Adversary
14 resulted in an injunction against Whitney. The judgment in that case
15 is on appeal to the District Court. The Ninth Circuit has found that
16 a final federal court judgment may be the basis for claim preclusion
17 despite a pending appeal. See *Tripathi v. Henman*, 857 F.2d 1366, 1367
18 (9th Cir. 1988); see also 18 Moore's Federal Practice § 131.30[2][c]
19 (Matthew Bender 3d ed. 2014) (discussing generally). Thus, for this
20 analysis, the Judgment is a final judgment on the merits.

21 The parties dispute whether there is an identity of claims between
22 the First Adversary and the Second Adversary.

23 The Ninth Circuit considers four factors in determining an
24 "identity of claim" for purposes of claim preclusion: "(1) whether
25 rights or interests established in the prior judgment would be
26 destroyed or impaired by prosecution of the second action; (2) whether

1 substantially the same evidence is presented in the two actions; (3)
2 whether the two suits involve infringement of the same right; and (4)
3 whether the two suits arise out of the same transactional nucleus of
4 facts." *Turtle Island Restoration Network v. U.S. Dep't of State*, 673
5 F.3d 914, 917-18 (9th Cir. 2012) (quoting *Costantini v. Trans World*
6 *Airlines*, 681 F.2nd 1199, 1201-02 (9th Cir. 1982)). "The last of these
7 criteria is the most important." *Id.*

8 The Ninth Circuit's analysis of whether two suits arise out of the
9 same transactional nucleus of facts employs the "transactional"
10 approach, which is described in § 24 in the Restatement (Second) of
11 Judgments. See *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir.
12 1992), as amended (June 23, 1992) (citing the Restatement in its
13 application of the transactional approach). Section 24 states:

14 (1) When a valid and final judgment rendered in an action
15 extinguishes the plaintiff's claim pursuant to the rules of
16 merger or bar ... the claim extinguished includes all rights
17 of the plaintiff to remedies against the defendant with
18 respect to all or any part of the transaction, or series of
19 connected transactions, out of which the action arose.

20 (2) What factual grouping constitutes a "transaction," and
21 what groupings constitute a "series" are to be determined
22 pragmatically, giving weight to such considerations as
23 whether the facts are related in time, space, origin, or
24 motivation, whether they form a convenient trial unit, and
25 whether their treatment as a unit conforms to the parties'
26 expectations or business understanding or usage.

1 That is, "whether two suits arise out of the 'same transactional
2 nucleus' depends upon 'whether they are related to the same set of
3 facts and whether they could conveniently be tried together.'"
4 *ProShipLine Inc. v. Aspen Infrastructures Ltd.*, 609 F.3d 960, 968 (9th
5 Cir. 2010) (citing *Ulloa*). "A later claim arises from a different
6 transactional nucleus of facts where the later claim alleges 'new
7 injuries caused by new acts' of the defendant." *MGA Entm't, Inc. v.
8 Mattel, Inc.*, 2012 WL 569389, at *6 (C.D. Cal. Feb. 21, 2012) (citing
9 *Tahoe-Sierra*, 322 F.3d at 1076).

10 This court issued the injunctions and served as trier of fact and
11 law in the First Adversary. As such, the court may take judicial
12 notice of the prior proceedings before it.² *United States v. Wilson*,
13 631 F.2d 118, 119 (9th Cir. 1980) ("a court may take judicial notice of
14 its own records in other cases").

15 The First Adversary focused on claims for declaratory and
16 injunctive relief related to the application and termination of certain
17 agreements, and the related transfer of Debtor's business operations
18 away from PTV. In support of his request for the Preliminary
19 Injunction, the Trustee declared that based on his review of PTV
20 records obtained pursuant to an order in the main case, he "identified
21

22 ² On January 20, 2015, the court issued an Order and Notice of
23 Intent to take Judicial Notice of certain pleadings identified in
24 the First Adversary. The Order provided parties until February 4,
25 2015 to file any response to the court's intent to take judicial
26 notice. Both Trustee and Whitney filed responses on February 4,
2015, which the court considered prior to issuance of this
memorandum decision.

1 a substantial number of transactions that demonstrate PTV's misuse of
2 funds, including:

- 3 o Personal expenses of Randall Whitney including dental
4 expenses, car rental and airfare expenses, payments to his
5 spouse, legal expenses and other personal expenses;
6 o Substantial cash withdrawals by Randall Whitney"

7 *Declaration of Chapter 11 Trustee Kyle Everett in Support of Issuance
8 of Preliminary Injunction*, Doc #62, filed 11/7/2013.

9 This declaration establishes that the Trustee was aware of
10 improper post-petition transfers by PTV to Whitney of Debtor's rents
11 at least six months prior to trial in the First Adversary.

12 The complaint in the First Adversary also included claims for
13 accounting and turnover against one or more defendants. As part of the
14 Preliminary Injunction the court required turnover of additional books
15 and records related to Debtor. The turnover of records was difficult
16 and required a continuing process over several hearings. The Trustee
17 was never fully satisfied that all books and records were provided.
18 However, the Trustee obtained sufficient information - primarily
19 through Quickbooks records - to identify rents received by PTV on
20 Debtor's behalf and rents paid to Debtor. Ultimately, the Trustee
21 obtained the Judgment of \$566,685 against PTV in the First Adversary.
22 At the hearing on this motion, the Trustee's counsel confirmed that the
23 allegedly avoidable transfers in the Second Adversary are based on a
24 subset of the transfers for which the Trustee obtained a judgment
25 against PTV in the First Adversary.

26

1 On this basis, the court finds that the accounting and turnover
2 claims of the First Adversary and the claim to avoid post-petition
3 transfers of the Second Adversary are related to the same set of facts
4 and could be conveniently tried together. The Second Adversary asserts
5 a new legal claim for recovery of funds subject to turnover in the
6 First Adversary. As such, the two suits arise out of the same
7 transactional nucleus of facts.

8 As for the remaining factors to consider in determining an
9 "identity of claim," the court finds the second factor is satisfied as
10 substantially the same evidence is presented as Exhibit 1 to the
11 complaint in the Second Adversary as was admitted as Exhibit 4 at trial
12 in the First Adversary. The third factor is also satisfied as both
13 suits involve infringement of the estate's right to avoid and recover
14 transfers of postpetition rents of the debtor. Finally, the first
15 factor is satisfied as the Trustee's determination to only pursue
16 injunctive relief against Whitney in the First Adversary will be
17 impaired by the recovery of a judgment in the Second Adversary.

18 Accordingly, the court finds an identity of claims that were
19 tried, or could have been tried, in the First Adversary and Second
20 Adversary.

21
22 Conclusion

23 The court finds that *res judicata* prevents the Trustee from
24 pursuing the Second Adversary against Whitney on the basis that the two
25 adversary proceedings present an identity of claims, the Judgment in
26

1 the First Adversary is a final judgment on the merits, and there is
2 privity between the parties.

3 Counsel for Whitney is directed to file a judgment granting its
4 motion and dismissing this adversary proceeding on the basis of *res
5 judicata*.

END OF ORDER

COURT SERVICE LIST

1 All recipients
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26